

Moutal v A.O. Smith Water Prods. Co

2022 NY Slip Op 33662(U)

October 24, 2022

Supreme Court, New York County

Docket Number: Index No. 190086/2019

Judge: Adam Silvera

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. ADAM SILVERA PART 13

Justice

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PAUL MOUTAL,

Plaintiff,

- v -

INDEX NO. 190086/2019

MOTION DATE

MOTION SEQ. NO. 004

A.O. SMITH WATER PRODUCTS CO, AMCHEM PRODUCTS, INC., N/K/A RHONE POULENC AG COMPANY, N/K/A BAYER CROPSCIENCE INC., AMERICAN BILTRITE INC, BURNHAM, LLC, INDIVIDUALLY, AND AS SUCCESSOR TO BURNHAM CORPORATION, BW/IP, INC. AND ITS WHOLLY OWNED SUBSIDIARIES, CERTAINTEED CORPORATION, CLYDE UNION, INC, COMPUDYNE CORPORATION, INDIVIDUALLY, AND AS SUCCESSOR TO YORK SHIPLEY, INC, CRANE CO., CROWN BOILER CO., F/K/A CROWN INDUSTRIES, INC., DAVID FABRICATORS INC A/K/A DAVID ASBESTOS CORP, DOMCO PRODUCTS TEXAS, INC, FLOWSERVE US, INC. SOLELY AS SUCCESSOR TO ROCKWELL MANUFACTURING COMPANY, EDWARD VALVE, INC., NORDSTROM VALVES, INC., EDWARD VOGT VALVE COMPANY, AND VOGT VALVE COMPANY, FMC CORPORATION, ON BEHALF OF ITS FORMER CHICAGO PUMP & NORTHERN PUMP BUSINESSES, G.S. BLODGETT CORPORATION, GENERAL ELECTRIC COMPANY, GOODYEAR CANADA, INC, GOULDS PUMPS LLC, GRINNELL LLC, HONEYWELL INTERNATIONAL, INC., F/K/A ALLIED SIGNAL, INC. / BENDIX, ITT LLC., INDIVIDUALLY AND AS SUCCESSOR TO BELL & GOSSETT AND AS SUCCESSOR TO KENNEDY VALVE MANUFACTURING CO., INC, JENKINS BROS, MANNINGTON MILLS, INC, PEERLESS INDUSTRIES, INC, PFIZER, INC. (PFIZER), QCP, INC., INDIVIDUALLY AND AS SUCCESSOR TO BAKERS PRIDE OVEN COMPANY, INC, RHEEM MANUFACTURING COMPANY, SLANT/FIN CORPORATION, THE GOODYEAR TIRE AND RUBBER COMPANY, U.S. RUBBER COMPANY (UNIROYAL), UNION CARBIDE CORPORATION, UTICA BOILERS, INC., INDIVIDUALLY AND AS SUCCESSOR TO UTICA RADIATOR CORPORATION, VIKING PUMP, INC, WEIL-MCLAIN, A DIVISION OF THE MARLEY-WYLAIN COMPANY, A WHOLLY OWNED SUBSIDIARY OF THE MARLEY COMPANY, LLC, AERCO INTERNATIONAL, INC., BMCE INC., F/K/A UNITED CENTRIFUGAL PUMP, BORGWARNER MORSE TEC LLC, BIRD INCORPORATED,

DECISION + ORDER ON MOTION

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 004) 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 259, 337, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378

were read on this motion to/for DISMISSAL.

Upon the foregoing documents, it is hereby ordered that Defendant Burnham LLC (hereinafter referred to as "Burnham") motion for partial summary judgment is denied for the reasons set forth below.

The instant matter is premised upon Plaintiff's alleged exposure to asbestos resulting from the removal of Burnham boilers. During his deposition on July 30 through August 1 of 2019, Plaintiff testified that he removed Burnham boilers within residential locations in New York City and Burlington, Vermont from approximately 1971 to 1999. Plaintiff recognized Burnham as the manufacturer of the boilers he removed by the name on the boiler itself. Plaintiff also testified that his asbestos exposure was from gaskets and insulation as Plaintiff dismantled and removed Burnham boilers. Plaintiff argues that the imposition of punitive damages are warranted, as Burnham failed to place a warning on their boilers even after obtaining knowledge of the harmful and dangerous effects when exposed to asbestos. Conversely, Burnham argues that any asbestos exposure from Plaintiff's work on Burnham boilers was significantly below threshold limit values and exposure limits set by the standards and regulations of the Occupational Safety and Health Act (hereinafter referred to as "OSHA"). Burnham moves for partial summary judgment on the issue of punitive damages. Plaintiff opposes, and Burnham replies.

Pursuant to CPLR 3212(b), a motion for summary judgment, “shall be granted if, upon all the papers and proof submitted, the cause of action or defense shall be established sufficiently to warrant the court as a matter of law in directing judgment in favor of any party.” “[T]he proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact. This burden is a heavy one and on a motion for summary judgment, facts must be viewed in the light most favorable to the non-moving party. If the moving party meets this burden, the burden then shifts to the non-moving party to establish the existence of material issues of fact which require a trial of the action”. *Jacobsen v New York City Health and Hosps. Corp.*, 22 NY3d 824, 833 (2014) (internal citations and quotations omitted). “The moving party’s ‘[f]ailure to make [a] prima facie showing [of entitlement to summary judgment] requires a denial of the motion, regardless of the sufficiency of the opposing papers’”. *Vega v Restani Constr. Corp.*, 18 NY3d 499, 503 (2012) (internal emphasis omitted).

In support of their motion, Burnham contends that Plaintiff cannot identify evidence to justify the imposition of punitive damages and that such damages are not warranted under New York Law. *See Memorandum Of Law In Support Of Defendant Burnham LLC’s Motion For Partial Summary Judgment*, p. 9. Burnham relies upon a study conducted by Dr. William E. Longo, a microscopist, arguing that Plaintiff’s exposure to asbestos was below OSHA’s permissible exposure limit (hereinafter referred to as “PEL”). As such, Burnham contends that Burnham’s failure to warn does not rise to reckless and wanton disregard to support a claim for punitive damages. In opposition, Plaintiff argues, *inter alia*, that “Burnham’s attempted reliance on the one isolated study by a microscopist, coupled with its misuse and misrepresentations. . .

demonstrate the [lack of merit in the] present motion.” Affirmation In Opposition To Burnham’s Motion For Partial Summary Judgment, p. 5, ¶ 14.

In toxic tort cases, the New York Court of Appeals has adopted a gross negligence standard for the purposes of punitive damages, holding that punitive damages are warranted when “the actor has intentionally done an act of an unreasonable character in disregard of a known or obvious risk that was so great as to make it highly probable that harm would follow and has done so with conscious indifference to the outcome.” *Maltese v Westinghouse Elec. Corp.*, 89 NY2d 955, 956-957 (1997) (internal quotations omitted). “The purpose of punitive damages is not to compensate the plaintiff but to punish the defendant for wanton and reckless, malicious acts and thereby to discourage the defendant and other people, companies from acting in a similar way in the future”. *Matter of 91st St. Crane Collapse Litig.*, 154 AD3d 139, 156 (1st Dept 2017) (internal parenthesis omitted).

In the case at bar, the single study conducted by Dr. Longo does not support a finding for partial summary judgment on the issue of punitive damages. In his deposition testimony, Dr. Longo concedes that he never conducted any studies on a Burnham boiler. *See* Affirmation In Opposition, *supra*, Exh. 4, Depo. Tr. of William E. Longo, PH.D., dated December 16, 2015, p. 36, ln. 10 – 12. Further, Dr. Longo does not rely upon any information regarding Burnham boilers, as Dr. Longo testified that he relies on the mixing and removal of materials which cause significant exposure. *See Id.* at p. 37, ln. 14 – 17. “A court’s function on a motion for summary judgment involves issue finding rather than issue determination”. *Farias v Simon*, 122 AD3d 466, 468 (1st Dept 2014). Here, the Court need only determine whether a genuine issue of material fact exists as to whether Burnham’s conduct rises to the level of wanton disregard for punitive damages to be imposed. Dr. Longo’s study cannot unambiguously establish that

Plaintiff's asbestos exposure was below OSHA's PEL. As such, Dr. Longo's study which infers Plaintiff's exposure was below OSHA's PEL does not refute that Burnham may have acted with wanton disregard by failing to warn Plaintiff of the ultra-carcinogenic hazards of asbestos.

It is important to note that Burnham's reliance on *Maltese, supra*, is misplaced. Namely, Burnham contends that according to *Maltese*, a general awareness of significant exposure to asbestos is insufficient to support a finding of punitive damages. See Memorandum Of Law In Support, *supra*, at p. 8. However, the Court of Appeals has held that "[a] products liability action founded on a failure to warn involves conduct of the defendant having attributes of negligence which the jury may find sufficiently wanton or reckless to sustain an award of punitive damages". *Home Ins. Co. v. Am. Home Products Corp.*, 75 NY2d 196, 204 (1990) (internal citations omitted). Furthermore, Plaintiff has provided evidentiary facts tending to show that Burnham's warnings were deficient such that the adequacy of such warnings are a factual question that should be resolved by a jury. See *Eiser v Feldman*, 123 AD2d 583, 584 (1986). As such, issues of fact exist to preclude summary judgment, and Burnham's motion is denied.

Accordingly, it is

ORDERED that Defendant Burnham LLC's motion for partial summary judgment is hereby denied in its entirety; and it is further

ORDERED that, within 21 days of entry, plaintiffs shall serve a copy of this decision/order upon all parties, together with notice of entry.

This constitutes the decision/order of the Court.

10/24/2022

DATE

ADAM SILVERA, J.S.C.

CHECK ONE:

CASE DISPOSED
GRANTED DENIED
SETTLE ORDER
INCLUDES TRANSFER/REASSIGN

NON-FINAL DISPOSITION
GRANTED IN PART
SUBMIT ORDER
FIDUCIARY APPOINTMENT

OTHER
 REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: